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Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554



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| In re | ) | |
| Request of Cellular Communications of Puerto Rico, Inc. to Hold Auctions to License Certain Cellular RSAs | ) | RM-8897 |

To: Chief, Commercial Wireless Division
Wireless Telecommunications Bureau

**COMMENTS**



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## Summary

Each member of the RSA Operators Group ("RSAOG") has at least one application pending in each of the six RSA markets that are the subject of the rulemaking commences by virtue of unlawful ex parte communications between Cellular Communications of Puerto Rico ("CCPR") and members of the Commission staff. CCPR has petitioned the Commission to substitute the RSA lottery process for determining initial permanent licensees in these with an auction process.

The RSAOG opposes CCPR's proposal. Legally the Commission is precluded from subjecting the RSAOG to auctions. An auction process would impose new duties upon and increase the liabilities of the RSAOG members, therefore, because Congress did not explicitly give the Commission the authority to retroactively apply its auction authority, the Commission is precluded from doing so. In addition, the RSAOG applications are cut-off and protected from the solicitation of any new competing applications for the six subject RSA markets. Finally, auctions cannot be used to select from among the applicants for these six RSA because the applicants did not have notice of the possibility that competitive bidding would be used to select licensees.

At the time the Budget Act was passed by Congress, there were thousands of pending applications before the Commission for licenses which would provide services that would make the licensing process subject to auction. Not a single one of those applications has been processed by auction and there is no reason

to treat the applicants in these six RSA markets any differently.

The applications in these six RSA markets have been pending for eight years through no fault of the applicants. Implementation of an auction proceeding at this late date will cause a tremendous delay in the licensing process, contrary to the very purpose Congress gave the Commission auction authority.

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**COMMENTS**

The RSA Operators Group ("RSAOG"), by their counsel, respectfully submit their Comments in response to the Commission's October 24, 1996 Lottery Notice, Mimeo No. 63896 concerning the Petition for Declaratory Ruling or, in the Alternative, for Rulemaking ("Petition") filed by Cellular Communications of Puerto Rico, Inc. ("CCPR").[1]

**Introduction**

On July 12, 1996, the Commission issued a Public Notice stating that on September 18, 1996, it would relottery six cellular Rural Service Area ("RSA") markets where the original lottery winners had been disqualified ("Lottery Schedule Notice"). Each member of the RSAOG has had pending applications for authorizations

[1] The RSAOG is responding to a Commission request for Comment, and in so doing is not seeking the dismissal of any of the pending RSA applications which have been accepted for filing. Accordingly, the RSAOG respectfully requests waiver of the Commission's service requirement for any person, such as CCPR, that requests the Commission to act adversely to pending, cut-off applications. Comments filed by such persons, if not served directly upon every applicant, must be stricken under the Due Process Clause of the U.S. Constitution.

in one or more of those six RSA markets since the original lotteries of those markets in 1989.

Following prohibited and late-reported *ex parte* communications with the Commission, CCPR filed its Petition on September 9, 1996, also on an unlawful *ex parte* basis. The Petition asks the Commission to consider employing competitive bidding instead of lotteries to license six cellular RSA markets where the original lottery selectee was disqualified. CCPR also implies a desire to participate in an auction for the initial permanent authorization for Market No. 727-A (Ceiba, PR), although CCPR as the holder of Interim Operating Authority ("IOA") is disqualified from applying for such initial permanent authorization. Indeed, CCPR voluntarily dismissed its original 1988 application for permanent authorization for the Ceiba RSA in order to obtain its current IOA.

The members of the RSAOG and thousands of other applicants filed their applications for the six subject cellular RSA markets over eight years ago and collectively, paid hundreds of thousands of dollars in filing fees to the Commission, obtained firm financial commitments from lenders and invested substantial sums in legal and engineering application preparation fees in order to file their applications. The Communications Act of 1934, as amended (the "Act"), and Commission rules in effect at the time the RSA applications were filed limited the Commission to selection by either comparative hearing or lottery.

On August 10, 1993, Congress passed the Omnibus Budget Reconciliation Act of 1993 ("Budget Act") which added a new Section

309(j) to the Act. The new section granted the Commission authority for the first time to use competitive bidding to select licensees from among mutually exclusive applications. Since then the Commission has consistently concluded that retroactive application of its auction authority is not in the public interest. Every other pre-July 26, 1993 mutually-exclusive application that was pending when the Budget Act was passed has been subject to a lottery (not an auction) procedure.

As will be demonstrated below, applying a competitive bidding plan to the six remaining RSA markets under consideration in this proceeding would be a violation of the due process rights of the members of the RSAOG and the other applicants that timely filed their RSA applications. *See* Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994); McElroy Electronics Corp. v. FCC, 86 F.3d 248 (D.C. Cir. 1996). As will also be demonstrated below, the utilization of auctions to determine RSA licensees is inequitable and contrary with past Commission precedent. These six RSA proceedings represent on-going FCC proceedings, and to change methodology once the comparative selection process has commenced is contrary to public policy.

Further, were the Commission to select a competitive bidding format at this stage, the delay in licensing that would necessarily ensue runs counter to the public interest in expeditiously licensing these RSA markets. In addition, the administrative cost of changing gears in mid-stream might very well eviscerate any revenues the Commission might receive in an auction of these six

RSA markets. All of these factors mitigate against the use of auctions to license these six RSA markets.

## I. Implementation of a Competitive Bidding Plan for These Six RSA Markets Would Violate the Due Process Rights of RSAOG Members

### A. The Use of Auctions Would be an Unlawful Retroactive Application of Its Rules

For the Commission to apply its auction authority retroactively would be contrary to recent U.S. Supreme Court precedent. In Landgraf, the Supreme Court stated:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach.... When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf, 114 S.Ct. at 1505. Application of the Commission's auction authority to RSAOG members and similarly situated cellular RSA applicants that filed RSA applications with the Commission before July 26, 1993 is impermissible. The RSAOG members' constitutional due process rights and their Ashbacker[2] rights would be violated if auctions replaced lotteries. Substantial new duties (including the need to obtain new financing to participate in an auction) would be placed on those applicants. The applicants would also be subject to increased liabilities (i.e., the loss of all

[2] Ashbaker Radio Corp. v. FCC, 326 U.S. 327 (1945).

time and money invested in the preparation and prosecution of their lottery applications) in order to make their applications acceptable under an auction plan.

Assuming the Commission would promulgate rules similar to the auction rules employed in other services, the RSAOG would be required to obtain new and additional financing and amend their pending applications to demonstrate compliance with new financial requirements mandated by an auction process. Further, these applicants would have to provide revised ownership information, and disclose all financing arrangements and other agreements concerning sources of bidding funds. To comply with auction rules, RSAOG members would also be required to calculate and disclose net worth of principals and affiliates of the applicants, and recompute business plans and financial projections to factor in additional costs associated with acquisition of the licenses by auction instead of lottery.

Should the Commission decide to use a competitive bidding process instead of a lottery in these six RSA markets, all of the investments in the pending RSA applications made by the thousands of applicants would have been in vain.[3] Applicants developed business plans and cost estimates consistent with a lottery based licensing plan. In addition to legal and engineering application preparation costs based on a random selection process, the RSAOG

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[3] And as the Commission conceded, the funds expended by these applicants on FCC filing fees would likely be subject to refund. Memorandum Opinion & Order, 9 FCC Rcd 7387, 7392 (1994) ("MO&O").

and other cellular RSA applicants expended a considerable amount of time and money to obtain documentation necessary to meet the Commission's firm financial commitment requirement.

According to Landgraf, the Commission would need clear Congressional authorization before imposing new duties upon and increasing liability to RSAOG members. Also, as discussed later, additional protections accrue to applications which have already been accepted for filing and "cut-off" from competitors by the Commission. In this case, Congress did not provide such authorization.[4] In fact, Congress recognized that applications on file with the Commission prior to enactment of the Budget Act could be processed by lottery instead of auction.[5]

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[4] In Landgraf, supra, the Court stated that

> [r]equiring clear [Congressional] intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates to Congress responsibility for fundamental policy judgements concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate.

Landgraf, 114 S. Ct. at 1501.

[5] *See* Budget Act, Special Rule, Section 6002(e):

> The Federal Communications Commission shall not issue any license or permit pursuant to Section 309(i) of the Communications Act of 1934 [random selection procedures] after the date of enactment of this Act unless .... one or more applications for such license were accepted for filing by the Commission before July 26, 1993.

**B. The Commission Cannot Accept Any New Applications for Any of These Six RSA Markets**

In its Petition CCPR suggests that it (and other potential new applicants) should be allowed to file applications at this late stage to participate in the proposed auction. *See e.g.*, Petition at pp. 5-6. The RSAOG's constitutional due process rights would be violated if additional applicants are allowed to now enter the existing pool of "cut-off" mutually-exclusive applicants in each of the six markets.

In Florida Institute of Technology v. FCC, 952 F.2d 549 (D.C. Cir. 1992), the court observed that timely filers, such as the members of the RSAOG, "have a legitimate expectation that cut-off rules will be enforced." FIT, 952 F.2d at 554. The Commission's various cut-off rules are designed "to attract all competitive applications for a particular [frequency] within a fixed and reasonably short time frame, allowing the Commission to satisfy its Ashbacker obligations with a single, fairly prompt comparative hearing." Id. at 550.

In McElroy, supra, the Commission was faced with two groups of applicants. The first group filed cellular unserved area applications in 1988 before the Commission promulgated specific rules concerning the processing of such unserved area applications. The other group, the so-called "March 10 filers" filed their applications subsequent to the first group, pursuant to a later Commission order that established cellular unserved area filing and processing procedures. *See* Report and Order on Unserved Area Applications, 6 FCC Rcd 2449 (1992) ("R&O"). The Commission's R&O

was issued after the early filer's applications had appeared on Public Notice.

The Commission held that both groups of applicants (the early filers and the March 10 filers) should be included in a lottery to determine cellular unserved area licensees. The early filers appealed to the D.C. Circuit, which reversed. The court held that:

> The notice and cut-off procedure serves the public's interest in administrative finality and prompt issuance of licenses. Furthermore, as against latecomers, timely filers who have diligently complied with the Commission's requirements have an equitable interest in the enforcement of the cut-off rules. To serve these purposes, the court has frequently affirmed the Commission's strict enforcement of its rules. Moreover, the Commission may not decline to enforce its deadlines so long as the rules themselves are clear and the public notice apprises potential competitors of a mutually exclusive application.

McElroy, supra, 86 F.3d at 257 (emphasis added, internal citations omitted.) Thus, the court concluded that the March 10 filers had missed their opportunity and were not entitled to participate against their more timely filed rivals.

RSAOG members have a right to be protected from the solicitation of any new applicants to compete in the proceedings to issue permanent licenses in the six subject RSA markets. Only applicants that timely filed in the RSA filing windows some eight years ago should be allowed to compete for the initial licenses in these six RSA markets.

### C. The Pending Applications Cannot Be Subjected to an Auction Process because They Did Not Have Notice of the Possible Implementation of an Auction Process

Applications for the six cellular RSA market lotteries in question were first filed with the Commission approximately eight

years ago and accepted for filing seven years ago. Lotteries were held in 1989, seven years ago, and tentative selectees were chosen for each cellular RSA market including the six RSA markets that were the subject of the recent Lottery Schedule Notice. The tentative selectees in these six cellular RSA markets were found to be unqualified to be Commission licensees.[6]

The Commission cannot change its methodology in selecting from among competing "cut-off" applicants without having given notice of the possible change to applicants prior to the time applicants filed their applications. Therefore, a relottery from among the remaining original applicants must be conducted.

A decision to change from one form of selection to another is permissible only upon adequate prior notice. Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C. Cir. 1984). The court specifically found that applicants who complained of the Commission's decision to change selection methodology from comparative hearings to lotteries were all on notice of the possibility that lotteries could be employed before filing their applications. Maxcell, 815 F.2d at 1555. Further, the Maxcell court found that the applicant's Ashbacker rights were not disturbed because: (1) all of the applicants that applied for a particular market would be equally subject to the same lottery and (2) rather than placing additional burdens on applicants, the switch from comparative hearings to lotteries actually reduced the

[6] Indeed, the dismissals of the six original lottery winners were all final, unappealable orders long before the Budget Act was passed.

time and money pending applicants would have to spend in the prosecution of their applications. Id.

Therefore, when the Commission was faced with choosing a methodology (either lottery or auction) for the selection from among cellular unserved area applicants that were pending at the time of enactment of the Budget Act, it decided to continue to utilize lotteries because the applicants did not have adequate notice of the possibility of auctions when they filed their applications.

Memorandum Opinion and Order, 9 FCC Rcd 7387, 7391 (1994) ("MO&O").

At the time the RSAOG and other RSA applicants filed their applications, the possibility of utilizing a competitive bidding process had not even been discussed. Competitive bidding as a means of selecting licensees was still years in the future. Simply stated, applicants were not provided with adequate notice of the possibility that auctions might be used to select cellular unserved area licensees.

## II. Several Other Considerations Favor the Continued Application of the Random Selection Process for these Pre-July 26, 1993

### A. The Use of Competitive Bidding to Select Licensees for for These Six RSA Markets Is Counter to Commission Precedent

When the Budget Act (and specifically Section 309(j) (47 U.S.C. § 309(j)(2) and the Special Rule) was enacted by Congress, Interactive Video Data Services ("IVDS") applications for the top nine markets were pending. The Commission decided in September

1993 to use lotteries to select licensees from among those mutually exclusive IVDS applications.

Similarly, Multipoint Distribution Service ("MDS") applications accepted for filing prior to July 26, 1993, were also pending. For several reasons, including to avoid delays in service to the public, and in recognition of the fact that those applicants had already faced substantial delays, the Commission decided to use lotteries to select MDS licensees from among the pre-July 26, 1993 mutually exclusive applicants. *See* Notice of Proposed Rulemaking Regarding Implementation of Competitive Bidding, 8 FCC Rcd 7635, 7661 (1993) ("Auction NPRM"). Mutual exclusivity among Multipoint Multichannel Distribution Service ("MMDS") applications which were accepted for filing before July 26, 1993 was also resolved by lottery for the same reasons as the MDS applications. Id.

As previously mentioned, licenses for cellular unserved area applications that were accepted for filing prior to July 26, 1993 were ultimately resolved by lottery. The Commission, in initially considering auctions, reasoned that auctions would facilitate more rapid deployment of new service, and provide greater opportunity for a wider variety of applicants to become cellular licensees, even though it did not intend to allow any new applicants to participate in the proposed auction. Auction NPRM, 8 FCC Rcd 7661-7662. *See also* McElroy, supra. The commenters argued, and the Commission agreed, that use of auctions instead of lotteries would actually delay service to unserved areas and be unfair to those applicants who relied in good faith upon existing lottery

procedures. Consistent with the holding in Landgraf, supra, the Commission conceded that replacing lotteries with auctions would constitute an impermissible retroactive applications of administrative rules and law. MO&O 9 FCC Rcd at 7389-7390.

Use of auctions would be especially egregious here. As noted above, the dismissals of the six original lottery winners were all final, unappealable orders long before the Budget Act was passed. The government already had collected hundreds of thousands of dollars in fees which it expressly charged as compensation for the Commission's costs of processing via lottery. The applicants were thus entitled to diligent and timely processing of their pending cut-off applications. In other words, even if due process did not require lotteries to be held, common law principles of equity and the public interest as set forth in the IVDS and MDS decisions compel the utilization of lotteries here.

**B. Auctions Would Delay the Licensing Process.**

Applications for permanent authorizations for these RSA markets were first filed in 1988. Licensees for all RSA markets were selected by lottery. Then the tentative selectees in these six cellular RSA markets were disqualified. According to Commission rules, policy and practice, a relottery is to take place from among the remaining qualified applicants to determine a new licensee,[7] a relottery which the Commission had scheduled for September 18, 1996. Lottery Schedule Notice, supra.

[7] See Second Lottery R&O, supra, 53 RR2d at 1416.

CCPR's claim that "auctioning of these licenses is unlikely to result in any delay in service to the public" could not be true and is self-serving. Petition at p.5. To auction these six licenses would require a rulemaking proceeding to establish specific auction rules and procedures for these six RSA licensing proceedings. If the rules are at all similar to the rules promulgated for the auctions in other services, there will have to be a period during which applicants would be allowed to amend their applications to provide information necessary for the Commission to conduct auctions (i.e., information regarding new financing, maximum/minimum bidding eligibility, designated bidders, eligibility for bidding credits/installment payments etc.).[8] Once new rules are finally promulgated, and a subsequent application/amendment filing period is accomplished, the auction itself could takes weeks, if not months to complete. And should any of the now-pending applicants challenge the Commission's authority to auction these six licenses, the timetable for issuance of initial permanent authorizations by auction would just grow longer. As the Commission quite correctly observed in the unserved area proceeding, "...no assurance even exists that utilizing auctions for these particular applications would expedite the

[8] As the Commission noted in deciding to use lotteries to license cellular unserved areas, applicants would have to be given an opportunity to clarify their intents and arrangements for refunds of filing fees for applicants not interested in auction would have to be made. Then the entire application process would have to begin anew. MO&O, 9 FCC Rcd 7391-7392.

deployment of service to the public, a principal objective of the auction law." MO&O, 9 FCC Rcd at 7392.

CCPR's concern that a lottery winner might not be in position to commence service would not be resolved by the use of competitive bidding to issues these licenses. To begin with, the premise is incorrect. Licensees that receive their authorizations by competitive bidding have defaulted on their licenses even in the early stages of having to pay the Commission for those licenses. *See, e.g.*, Public Notice, DA 96-872, released May 30, 1996 ("18 Defaulted PCS Licenses to be Reauctioned"); Order, 78 RR2d 243 (WTB 1995) (denying four applicants' request for waiver of rules to extend time to make downpayment); Order To Show Cause in the Matter of Commercial Realty of St. Pete, Inc., 77 RR2d 490 (1995) (Winning bidder in 20 IVDS markets defaulted and proceeding initiated to investigate the propriety of its conduct before the Commission). Also, the Commission has existing firm financial commitment and buildout rules in place to assure expeditious construction of these systems. *See*, 47 C.F.R. §22.946 (1996) and former 47 C.F.R. §22.917(c) (regarding firm financial commitment requirements for RSA applicants). These rules have been highly successful in the past, with a greater than ninety-nine percent success rate.

The RSAOG's applications for licenses in the six subject RSA markets have been pending for eight years. The court requested in McElroy, supra, that "because the [early filers'] applications have been pending for almost eight years, due to no apparent fault of the appellants, it is hoped that the matter will be resolved

forthwith." McElroy, supra, 86 F.3d at 259. RSAOG respectfully requests that the Commission also follow the court's wishes in McElroy with respect to these six RSA market proceedings with a lottery from among only those applicants that are qualified to compete - - those that were timely filed pursuant to the cut-off rules and procedures in place eight years ago.

### C. Subjecting RSAOG Members to Competitive Bidding Is Unfair

Even if there were no legally enforceable due process requirements, utilization of auctions would be patently unfair. When RSAOG members filed their applications, they were not aware of the possibility that the Commission might be granted auction authority. More than eight years has passed since these applications were filed.

Were the Commission to implement an auction procedure for the RSAOG applications, all of the time and funds RSAOG members invested in the preparation of their applications would be lost. The new requirements of an auction process (i.e., to obtain new financing, recalculate budgets and business plans, submit new information and form bidding strategies) would result in the RSAOG members having to compile the equivalent of brand new applications to replace the timely filed applications that are now pending for the same six RSA markets. *See* pp.4-6 supra. Such a result is fundamentally unfair especially in light of the long period of time the RSAOG applications have been pending without Commission action through no fault of the applicants, while similarly situated RSA

applicants were processed according to the lottery/relottery procedure.

The Commission has not used auctions as a selection method for any other RSA applicant or for any other pre-July 26, 1993 applicant. What would make the Commission's decision even more inequitable in this situation is the fact that RSA applicants did not have the slightest notion that an auction might someday be used to determine the fate of their applications.

### D. This Proceeding Should Be Terminated Immediately Because CCPR is Precluded From Participating in Any Auction or Lottery and Is the Only Party that Benefits from Further Delay in Issuing a Permanent Authorization for the Ceiba RSA Market

As CCPR states in its Petition, its wholly-owned affiliate currently has IOA to operate the Ceiba, Puerto Rico RSA, one of the six RSAs which does not have a permanent licensee, and which CCPR argues should be licensed by auction. CCPR's then-100%-parent filed an application for the license for the Ceiba RSA in 1988, content to have the permanent licensee selected by lottery. Following the lottery, and the challenge of the lottery winner's qualifications to hold the Ceiba RSA authorization, CCPR requested grant of the IOA for that market. In exchange, CCPR voluntarily withdrew its application for permanent authorization for the Ceiba RSA. Another condition of receiving IOA was that CCPR not oppose any application for permanent authorization.

Now, in violation of the conditions of its IOA and to afford itself more time as the IOA holder in the Ceiba market, CCPR has delayed indefinitely but significantly the permanent licensing

process, and has impermissibly attempted to obtain the dismissal of all of the pending applications it had agreed not to oppose.

The Ceiba RSA proceeding became restricted upon public notice of the filing of mutually exclusive applications. 47 C.F.R. § 1.1208(c)(1); Russell H. Carpenter, Jr., Esq., 3 FCC Rcd 6141 (OMD 1988). *Ex parte* presentations remain prohibited until the proceeding is finally decided by Commission order or a settlement was approved by the Commission to terminate the proceeding. 47 C.F.R. § 1.1208(a). As a former applicant and the interim licensee, CCPR is fully aware of the status of the proceeding, but despite knowing that the proceeding was restricted, CCPR had a prohibited *ex parte* telephone conversation with the Chairman's legal advisor on August 23, 1996 to lobby for use of auctions instead of lotteries to determine a permanent licensee for the Ceiba RSA. CCPR followed that phone call with a prohibited personal meeting on August 28, 1996. CCPR was fully on notice that its actions were unlawful pursuant to Carpenter. Perhaps to head off any opposition until its efforts had succeeded in stopping the lottery, CCPR wrongfully delayed reporting its *ex parte* presentations until September 26, 1996, a full month later (and after the lottery was postponed).

This notice-and-comment rulemaking proceeding is the result of CCPR's prohibited *ex parte* communications. CCPR's actions have tainted this rulemaking proceeding, because the ultimate decision makers have been improperly influenced. See Press Broadcasting v. FCC, 59 F.3d 1365, 1369-1370 (D.C. Cir. 1995). The RSAOG has been

damaged because of the added delay in selecting from among competing applicants. CCPR is the primary cause for this delay, and actually benefits from the delay it has unlawfully caused because its affiliate can continue to operate its cellular system in Ceiba under its IOA. In light of these factors, the Commission must immediately terminate this proceeding and immediately reschedule and conduct the lotteries it had proposed in the Lottery Schedule Notice. After eight years, the RSAOG members are entitled to nothing less. Should CCPR attempt to oppose the immediate termination of this proceeding, its IOA for the Ceiba RSA should be immediately revoked and the Commission should issue an order instructing CCPR to directionalize its antennas in adjoining markets away from the Ceiba market.

**CONCLUSION**

The RSAOG's due process rights entitle its applications to be processed by a lottery. Consistent with Landgraf, the Commission should not retroactively apply the auction authority it was given in the Budget Act. To do so would infringe upon the rights of RSAOG members, impose substantial new duties upon the RSAOG and increase the liabilities of RSAOG members.

Implementation of an auction process in these six markets is improper because applicants for these licenses did not have notice of the possible use of auctions to select licensees. Maxcell, supra. When the RSAOG members filed their applications, the Commission had authority to utilize comparative hearings or

lotteries to select from among competing applicants. Commission authority to conduct auctions was still many years away.

The RSAOG applications are also protected from the solicitation of any additional applications for these six RSA markets. The RSAOG's Ashbacker rights would be compromised by allowing additional parties to file competing applications for licenses in these six RSA markets. RSAOG members filed their applications timely and in reliance on the Commission's processing rules, including the cut-off rules which established the eligible pool of applicants in each RSA proceeding. Consistent with McElroy, the application filing period for these six RSA markets has been closed since the filing window closed eight years ago.

Other considerations also disfavor the use of auctions to select licensees for these six RSA markets. Of the thousands of mutually exclusive applications that were pending before the Commission as of July 26, 1993 in services that meet the Section 309(j) criteria for auction, not a single one of the conflicts has been resolved by auction. To date, each mutually exclusive proceeding involving pre-July 26, 1993 applications has been decided by lottery.

The RSAOG and other RSA applicants have had their applications pending for eight years because unqualified applicants were selected in the first lotteries in each of these markets. These applicants are entitled to the same treatment as the thousands of other RSA applicants whose applications were filed and processed to finality under the lottery rules that were in place eight years ago

(i.e., selection of the second "selectee" in these markets must be made in the same manner as selection of the first). No additional applications for these six RSA markets can be accepted.

CCPR's musings to the contrary, there are no benefits sufficient to outweigh the rights of these applicants to final processing and the public interest in permanent licensees after eight years of administrative and legal delays. Any attempt to change the licensing plan at this late date would result in prolonged litigation, unnecessary delay and incalculable administrative expense, and would reward CCPR's unlawful *ex parte* adventures. The RSAOG members respectfully urge the Commission to terminate this proceeding immediately and reschedule the lottery proposed in the Lottery Schedule Notice as soon as possible.

Respectfully submitted,

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